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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-396

J. B. ROSE, FLORENCE ROSE and BROWNIE-ROSE CANDIES, INC., on behalf of themselves individually and as taxpayers of the City of Los Angeles and the State of California, and on behalf of all other taxpayers of the City of Los Angeles and State of California,

Petitioners,

vs.

THOMAS BRADLEY, in his capacity as the MAYOR OF THE CITY OF LOS ANGELES, C. ERWIN PIPER, individually and as CITY ADMINISTRATIVE OFFICER OF THE CITY OF LOS ANGELES, SAMUEL YORTY, CHARLES LUCKMAN AND ASSOCIATES, a corporation, CHARLES LUCKMAN, SAM BURNETT, ROBERT McRAE, THE CITY OF LOS ANGELES, a municipal corporation,

Respondents.

Brief of Respondents Charles Luckman Associates, Charles Luckman and Samuel M. Burnett in Opposition to Petition for Writ of Certiorari.

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SUBJECT INDEX

Page

Jurisdiction 1

Questions Presented for Review 2

Statement of the Case 2

A. Condemnation Action 3

B. Petition for Removal 7

C. State Court Fraud Action 9

D. The Present Federal Action 11

Reasons for Denying the Writ 14

Summary of Argument 14

I.

This Court Has Already Denied Petitioners Relief in a Prior Action Between the Parties Based Upon the Same Facts 16

II.

Petitioners have Failed to Advance Any Reason Which Would Justify Granting Certiorari 17

III.

The Decision of the Court of Appeal Below Was Manifestly Correct. It Thus Presents No Question Which Merits Supreme Court Review 18

A. Plaintiffs Failed to State a Claim for the Taking of Property Without Due Process of Law 18

Page

B. Petitioners Fail to Allege Any Violation of the Civil Rights Act 20

C. This Action Is Barred by the Defenses of Collateral Estoppel and Res Judicata 22

1. Collateral Estoppel Should Be Applied in This Action Against Plaintiffs on the Issue of Public Use 22

a. Identity of Issues 24

b. Final Judgment on the Merits .. 25

c. Petitioners Were Parties Defendant in the Condemnation Proceedings 26

2. The Judgment of Condemnation Is Res Judicata and Precludes Relitigation of the Constitutionality of the Taking 27

3. Petitioners Are Bound by the Determination in the State Court Fraud Action That There Was No Extrinsic Fraud to Justify a Collateral Attack on the Judgment of Condemnation .. 28

a. Identity of Issues 29

b. Final Judgment on the Merits .. 30

c. Petitioners Were Parties to the State Court Fraud Action 30

d. The California Cases Cited by Petitioners Are Inapplicable 31

Conclusion 34

TABLE OF AUTHORITIES CITED

Cases Page

Beistline v. San Diego, 256 F.2d 421 (9th Cir.), cert. den., 358 U.S. 865 (1958) 19, 20

Bernhard v. Bank of America, 19 Cal.2d 807 (1942) 23, 29

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 22, 24, 26

Brown v. Georgia Power Co., 371 F.Supp. 543 (S.D. Ga. 1973), aff'd 491 F.2d 117 (5th Cir.), cert. den. 419 U.S. 838 (1974) 27

Caldwell v. Taylor, 218 Cal. 471 (1933) 32, 33

Capron v. California, 247 Cal.App.2d 212 (1966).. 32

Chisholm v. House, 160 F.2d 632 (10th Cir. 1947) 28, 29

City of Los Angeles v. Dora Albert, et al., Los Angeles Superior Court No. 932216 3

Clark v. Watchie, 513 F.2d 994 (9th Cir. 1975) 23, 24

Cochran v. Union Lumber Co., 26 Cal.App.3d 423 (1972) 31

Connelly Foundation v. School Dist. of Haverford, 461 F.2d 495 (3d Cir. 1972) 22

Florasynth Labs. v. Goldberg, 191 F.2d 877 (7th Cir. 1951) 22

Georgia v. Chattanooga, 264 U.S. 472 (1924) 18

Green Street Ass'n. v. Daley, 373 F.2d 1 (7th Cir.), cert. den., 387 U.S. 932 (1967) 19, 21

Hamacher v. People, 214 Cal.App.2d 180 (1963) .. 32

Page

Hilliard v. Pennsylvania, 308 F.Supp. 756 (W.D. Pa. 1970), aff'd on other grounds, 438 F.2d 92 (3d Cir. 1971) 27

Holmes v. U.S., 231 F.Supp. 971 (N.D. Ga. 1964).. 22

Iacoponi v. New Amsterdam Casualty Co., 379 F.2d 311 (3d Cir. 1967) 22

Imbler v. Pachtman, 424 U.S. 409 (1976) 19, 20

J. B. Rose, et al. v. City of Los Angeles, et al., Los Angeles Superior Court No. 42538 9

J. B. Rose, et al., Petitioners v. City of Los Angeles, et al., Respondents, October Term, 1976, No. 76-1091 11

Jorgensen v. Jorgensen, 32 Cal.2d 13 (1948) 32

Kachig v. Boothe, 22 Cal.App.3d 626 (1971) ..31, 32

Landowners Consideration Ass'n. v. Montana Power Co., 300 F.Supp. 54 (D.Mont. 1969) appeal dism'd, 439 F.2d 722 (9th Cir. 1971) 19, 20, 21

Lester v. National Broadcasting Co., 217 F.2d 399 (9th Cir. 1954) 29

Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177 (3d Cir. 1972) 24, 26

Mooney v. Holohan, 294 U.S. 103 (1935) 19

Pentz v. Kuppinger, 31 Cal.App.3d 590 (1973) 32

People ex rel. Dept. of Pub. Wks. v. Lagiss, 223 Cal.App.2d 23 (1963) 25

Powell v. Jarvis, 460 F.2d 551 (2d Cir. 1972) 22

Robinette v. Chicago Land Clearance Comm'n., 115 F.Supp. 669 (N.D. Ill. 1951) 19, 21

Page

Sykes v. California (Dept. of Motor Vehicles), 497 F.2d 197 (9th Cir. 1974) 21

Thiriot v. Santa Clara School Dist., 128 Cal.App.2d 548 (1954) 32

Timmsen v. Forest E. Olson, Inc., 6 Cal.App.3d 860 (1970) 31

United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), cert. den. 379 U.S. 951 (1964) 26

Zisk v. Roseville, 56 Cal.App.3d 41 (1976) 19, 21

Rules

Federal Rules of Civil Procedure, Rule 12(b) 12, 22

Rules of the Supreme Court, Rule 19 17

Statutes

California Code of Civil Procedure, Sec. 1243.5 7

United States Code, Title 28, Sec. 1254(1) 1

United States Code, Title 42, Sec. 1983 .....2, 12, 14, 19, 20, 22

United States Constitution, Fourteenth Amendment 5

Textbooks

California Restatement of the Law of Judgments, Sec. 70 31

Matheson, Excess Condemnation in California; Proposals for Statutory and Constitutional Change, 42 S. Cal. L. Rev., pp. 421, 422, 425-27 (1969) 25

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THOMAS BRADLEY, in his capacity as the MAYOR OF THE CITY OF LOS ANGELES, C. ERWIN PIPER, individually and as CITY ADMINISTRATIVE OFFICER OF THE CITY OF LOS ANGELES, SAMUEL YORTY, CHARLES LUCKMAN AND ASSOCIATES, a corporation, CHARLES LUCKMAN, SAM BURNETT, ROBERT McRAE, THE CITY OF LOS ANGELES, a municipal corporation,

Respondents.

Brief of Respondents Charles Luckman Associates, Charles Luckman and Samuel M. Burnett in Opposition to Petition for Writ of Certiorari.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 7, 1979, affirming the dismissal of petitioners' Complaint in the United States District Court. Jurisdiction of this Court should properly be invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review.

1. Whether the condemnation of property pursuant to a state court eminent domain proceeding, in which the property owners received notice and an opportunity to be heard on all issues relating to public use and just compensation, constitutes a taking of property without due process of law where alleged perjury and concealment of evidence concerning the intended use of the property occurred at the plenary trial of the condemnation action.

2. Whether a private corporation and private citizens, who are alleged to have conspired with city officials in a fraudulent condemnation of property, were acting under color of state law within the meaning of the Civil Rights Act, 42 U.S.C. § 1983.

3. Whether a final judgment of condemnation entered in a state court eminent domain proceeding, in which property owners appeared and vigorously contested the taking, precludes relitigation of the public use and due process issues which were raised, or could have been raised, in that action, by reason of the doctrines of collateral estoppel and *res judicata*.

4. Whether a state court judgment, holding that a prior state court judgment of condemnation is not subject to collateral attack on the grounds of extrinsic fraud, precludes relitigation of the question of whether the condemnation judgment is subject to collateral attack on the grounds of extrinsic fraud, by reason of the doctrines of collateral estoppel and *res judicata*.

Statement of the Case.

Petitioners are attempting, in this action, to litigate for the third time the identical issues which have been decided adversely to them in two previous actions.

Their Complaint essentially seeks to recover damages for the alleged wrongful condemnation of their property. Petitioners contended in the condemnation action, as they did in the court below in this action, that the City of Los Angeles did not intend to use the land for a public use. Petitioners alleged that the City actually intended to sell the land for profit to private developers for use as a hotel and office building. Respondents successfully moved to dismiss the Complaint on the grounds that it failed to state a claim upon which relief could be granted. Respondents asserted, among other things, that the present action was barred by the doctrines of collateral estoppel and *res judicata*. In order to understand the basis of the trial court's action and the issues presented by this appeal, it is necessary to examine in some detail the history of the repetitive litigation between the parties.

A. Condemnation Action.

The first action involving the parties hereto was the suit entitled *City of Los Angeles v. Dora Albert, et al.*, Los Angeles Superior Court No. 932216, referred to in paragraphs 16 and 17 of petitioners' Complaint [C.T. pp. 3-4]. This was a condemnation action brought by the City of Los Angeles to condemn certain parcels of land for use in connection with the Los Angeles Convention Center. Among the defendants were J. B. Rose, Florence Rose and Brownie-Rose Candies, Inc., plaintiffs and petitioners herein, who owned the property referred to as Parcels 115R and 116R in the Complaint in Condemnation.

The pleadings from the condemnation action establish that the issues of whether Parcels 115R and 116R were intended for public use and whether the properties were necessary for such public use were fully raised and litigated by the parties.

In its Complaint in Condemnation [See Ex. A to Affidavit of Richard T. Davis, Jr., included in C.T. (hereinafter "Affidavit")], the City of Los Angeles alleged in paragraph X(c) on page 6, commencing on line 13, as follows:

> "That said Council in said Ordinance, in part, found and determined that the public interest, convenience and necessity required:
>
> * * *
>
> "(c) The acquisition in fee simple of certain real properties which are hereinafter designated and described as Parcels Nos. 112R, 113R, 114R, 115R, 116R, 117R, 118R and 119R . . ."

Defendants Brownie-Rose Candies, Inc., Florence F. Rose and J. B. Rose (petitioners herein) filed an Answer [Ex. B to Affidavit], in which they denied that the taking was for a public use or that the taking was necessary to a public use. Petitioners further raised the public use and public necessity issues in the affirmative defenses included in their answer.

Subsequently, as part of the Pre-Trial Conference Order [Ex. C to Affidavit], the parties filed a Joint Pre-Trial Statement in which the parties agreed that the public use question was an issue to be decided in the case. The public use issues were defined on page 5, commencing at line 14 [Ex. C to Affidavit], of the Joint Pre-Trial Statement as follows:

> "(1) ISSUES. (Agreed)
>
> "(1) The just compensation due the defendants herein for the taking of Parcels Nos. 115AA, 115R, 116AA and 116R.
>
> * * *
>
> "(3) Whether the use to which the property sought to be taken is to be applied is a use authorized by law.

> "(4) Whether the taking of said property is necessary to a use authorized by law.
>
> "(5) Whether the taking of said property will be the most compatible with the greatest public good and least private injury."

The respective parties then filed Memoranda of Points and Authorities [Exs. D and E to Affidavit], in which they fully briefed the Court on the public use issue. The position of the petitioners with respect to the public use question was in part stated in their Memorandum at page 6, beginning at line 22 [Ex. D to Affidavit], as follows:

> "The Defendants herein are averring that the property to be taken under parcels 115R and 116R are being taken for a private use and not public use as required by constitutional enactments and case law decisions heretofore cited. *The Defendants believe through the introduction of both testimony and demonstrative evidence at the hearing scheduled for April 18, 1969 will conclusively show that the properties taken (Parcels 115R and 116R) other than parcels 115AA and 116AA for use of street widening and street opening will be and is now contemplated for resale to private developers for uses which are not public in character.*" (Emphasis added).

In their Memorandum, Petitioners also raised the issue of taking of property without due process of law. The Roses first argued that the proposed use of their property for reservation and subsequent reconveyance to private interests was not a public use and constituted a taking in violation of the Fourteenth Amendment. In their Memorandum, the argument was stated at page 8 [Ex. D to Affidavit] as follows:

"The Defendants feel that Article I, Section 14½ of the Constitution of the State of California which purportedly gives the plaintiff the right to reconvey such property condemned under reservations is in direct conflict with Article I, Section 14 of the California State Constitution and is clearly violative of the 14th Amendment of the Constitution of the United States which protects the Defendants under the due process guarantees binding the various states comprising the United States of America."

In addition, the Roses also argued that the issuance of an order for immediate possession without a hearing also violated the fundamental requirements of due process.

Thereafter, on April 18 and 19, 1969, a full trial on the public use issue was held in Department 70a before the Honorable Richard Barry, Judge Pro Tempore of the Los Angeles Superior Court. The Minute Order [Ex. F to Affidavit] from the trial demonstrates that Samuel M. Burnett, Project Architect for Charles Luckman Associates and one of the respondents herein, testified at the trial. After the trial, the Court expressly found that the taking was for a public use authorized by law. The Minute Order recited the Court's finding as follows:

"The Court determines as follows:

"The use for which Plaintiff seeks to take the subject property is a use authorized by law and specifically by ordinance #136298 which was duly and regularly adopted by the counsel [*sic*]

of the City of Los Angeles in manner set forth on Page 6 beginning at Line 19 of the joint pretrial statement of the parties, and although that portion of the joint Pretrial statement was not admitted by defendants Rose and Brownie-Rose Candies, Inc., the Court concluded that it is a correct statement and is no longer an issue in this case."

Subsequently, a separate trial was held on the question of valuation, resulting in a Judgment of Condemnation after Trial [Ex. G to Affidavit]. That Judgment expressly refers to and incorporates the earlier finding of the Court on the public use issue. The Roses later entered into a Stipulation [Ex. H to Affidavit] in which they waived their rights to appeal the Judgment of Condemnation. The Judgment became final on February 25, 1970.

B. Petition for Removal.

After the Complaint in Condemnation was filed, the City of Los Angeles obtained an order of immediate possession pursuant to California Code of Civil Procedure, Section 1243.5. Defendants J. B. Rose and Florence Rose (petitioners herein) then filed a Petition for Removal in the federal court, Civil Action No. 68-1893-AAH in the United States District Court, Central District of California.

In their Petition for Removal, the Roses alleged federal jurisdiction on the grounds that their constitutionally-protected right against deprivation of due process was being violated by the state condemnation action. The Petition alleged, in paragraph 4 at page 3 [Ex. I to Affidavit]:

"That the Superior Court of the State of California for the County of Los Angeles in ordering the confiscation and immediate possession at request of the plaintiff without determining whether such property was being taken for a public use and for a public necessity has denied the Defendants the right not to be denied their property without due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States."

The City of Los Angeles thereafter filed a motion to remand the action to the state court on the grounds that no substantial federal question was presented by the Petition for Removal. In its Points and Authorities [Ex. J to Affidavit], the City of Los Angeles argued that the Complaint in Condemnation and the Petition for Removal failed to allege or demonstrate any factual basis for a finding that the Roses were being deprived of property without due process of law.

In their Memorandum in Opposition to the Motion to Remand [Ex. K to Affidavit], the Roses stated the issue as follows, at page 9:

"The Defendants believe and aver that the Plaintiffs' subsequent pleadings in conjunction with the Superior Court Order raises the federal question of the lack of due process enabling the condemnation action to be properly removed. Though the Defendants feel *this action is fraught with other federal questions that could properly be resolved through the State Court procedure and eventually might be decided in the Supreme Court of the United States,* such claims as evidenced by the initial pleading filed by the Defendants are not

in question here. The question raised is whether a Superior Court Judge, after an Ex Parte Declaration, can properly determine the City of Los Angeles has a legal right to take the Defendants property without due process of law as guaranteed by the 14th Amendment to the Constitution of the United States." (Emphasis added).

The motion to remand was granted on the grounds the action was not founded upon the Constitution, treaties or laws of the United States [Order of Remand, Ex. L to Affidavit].

C. State Court Fraud Action.

In November, 1972, petitioners filed a Complaint, Los Angeles Superior Court No. 42538, entitled *J. B. Rose, et al. v. City of Los Angeles, et al.,* to recover damages arising from the alleged wrongful and fraudulent condemnation of their land. Named as defendants in that action were the City of Los Angeles; C. Erwin Piper, Chief Administrative Officer of the City; Charles Luckman Associates ("CLA"), architects for the Convention Center project; Charles Luckman, President of CLA; and Samuel M. Burnett, Project Architect for CLA (CLA, Charles Luckman and Samuel M. Burnett are hereinafter sometimes referred to as "the Luckman Defendants").

The Third Amended Complaint in the state court fraud action is virtually identical to the Complaint filed in the present federal case. In the first cause of action, petitioners alleged that the City, Dr. Piper and the Luckman Defendants conspired to wrongfully condemn the subject property. Petitioners alleged that the property was not intended to be used for a public use but was intended to be used as the site for a

future hotel and trade center [Third Amended Complaint, paragraphs 12-14; Ex. M to Affidavit]. *These are precisely the same allegations made by petitioners as defendants in the first condemnation action.*

Dr. Piper and the Luckman Defendants allegedly were to share in the profits from the construction, development and operation of the hotel and trade center. The Third Amended Complaint further alleged that defendants testified falsely at the condemnation trial concerning the intended public use of the property and concealed the true facts relating to the private development. In the first cause of action, petitioners sought the restoration of the property, or alternatively, compensatory damages of $826,000.00 representing the alleged difference between the condemnation award and the present market value of the parcels involved. Petitioners also sought to recover punitive damages in the sum of $1,000,000.00.

Defendants in the state court fraud action filed successive demurrers to each of the Complaints and asserted that the doctrine of collateral estoppel prevented the relitigation of the public use issue. Defendants contended that the fraud alleged by petitioners did not constitute "extrinsic fraud" which deprived petitioners of their day in Court in the condemnation action. Defendants further asserted that since any alleged fraud was "intrinsic" only, petitioners failed to allege the basis for any collateral attack on the judgment of condemnation and were bound by the Court's determination of the public use and all other issues presented in that action. The Superior Court accepted these arguments and, after granting petitioners leave to amend on three occasions, sustained the demurrer to petitioners' Third Amended Complaint without leave to

amend [Minute Order, Ex. P to Affidavit]. On December 20, 1974, the action was dismissed [Minute Order, Ex. P to Affidavit].

Petitioners appealed the decision to the California Court of Appeal. On August 23, 1976, the Court of Appeal rendered its decision affirming the dismissal of the action by the trial court. The Court specifically agreed with defendants' contention that the action was barred by the traditional doctrine of collateral estoppel. On October 21, 1976, the Supreme Court of California denied a hearing to petitioners.

Petitioners then filed a Petition for Writ of Certiorari to the Supreme Court of the United States seeking review of the decision of the California Court of Appeal, *J. B. Rose, et al., Petitioners v. City of Los Angeles, et al., Respondents,* October Term, 1976, No. 76-1091. On May 2, 1977, this Court denied the Petition.

D. The Present Federal Action.

Petitioners, who now purport to be representatives of a class, brought the present action in the federal court, on April 29, 1975, in an apparent last, desperate attempt to relitigate the same issues decided adversely to them in the state condemnation and fraud actions.

Except for the class action and jurisdictional allegations, the Complaint in this action is virtually identical to the Third Amended Complaint filed in the state court fraud action. In addition to the defendants named in the state court fraud action, the Complaint in this action names as defendants Mayor Tom Bradley, former Mayor Sam Yorty and Robert McRae, Director of the Bureau of Right of Way and Land for the City of Los Angeles. The Complaint again seeks damages

arising out of the alleged wrongful and fraudulent condemnation of the subject property. The Complaint contains precisely the same factual allegations relating to the fraudulent conspiracy, and the alleged perjury and concealment of evidence at trial, which petitioners advanced without success in the state court fraud action. The purported federal jurisdiction in this action is based upon the theory that defendants' alleged actions violated the Civil Rights Act, 42 U.S.C. § 1983, and deprived petitioners of the subject property without due process of law.

Respondents filed a Motion to Dismiss under Rule 12(b) of the Federal Rules of Civil Procedure. In support of the motion, respondents contended that the present action was barred under the principles of *res judicata* and collateral estoppel by the judgments in the condemnation action and the state court fraud action. In this connection, the public use issue raised by petitioners was litigated in the condemnation action and decided adversely to them. Petitioners' claims of due process violations also were, or could have been, asserted by petitioners in the condemnation action. Similarly, petitioners' attack on the Judgment of Condemnation on the grounds of fraud was the issue in the state court fraud action. Petitioners are bound by the adverse judgments regarding all of these issues.

Respondents further contended in their Motion to Dismiss that the Complaint and the records from the condemnation action affirmatively showed that no violation of due process occurred in connection with the condemnation of the subject property. In this connection, petitioners received notice and an opportunity to be heard with respect to all factual and constitutional issues relating to the condemnation. Accordingly, petitioners received all that is guaranteed by the Due Process Clause. Furthermore, with respect to the Luckman Defendants, there was clearly no violation of the Civil Rights Act by these respondents, because no showing was made that these respondents were acting under color of state law.

On August 7, 1975, the Honorable Judge David W. Williams granted respondents' Motion to Dismiss and filed his written opinion in an Order Dismissing Complaint [C.T. pp. 86-89]. Judge Williams treated the motion as one for summary judgment since matters outside the Complaint were considered. With respect to the Luckman Defendants, the primary basis of Judge Williams' ruling was the collateral estoppel theory advanced by those defendants. Subsequently, on September 2, 1975, Judge Williams signed Findings of Fact and Conclusions of Law which were filed on September 11, 1975 [C.T. pp. 94-99].

Petitioners then appealed the decision to the Court of Appeals for the Ninth Circuit, No. 75-3004. On August 7, 1979, the Court of Appeals entered its judgment affirming the judgment of the trial court dismissing petitioners' Complaint.

Only the first cause of action of the Complaint was directed at the Luckman Defendants, on whose behalf this brief is submitted. The Complaint also contained a second cause of action directed at the municipal defendants, alleging improper expenditure of gas tax funds. Since this cause of action does not involve the Luckman Defendants, this brief will discuss only the issues raised by the first cause of action.

REASONS FOR DENYING THE WRIT.

SUMMARY OF ARGUMENT.

1. This Court has previously denied certiorari on the merits to the same parties in the same transaction.

2. Petitioners have failed to demonstrate the presence of any of the traditional reasons for granting certiorari.

3. The decision of the Court of Appeal was manifestly correct.

a. Petitioners have failed to state a claim for the taking of property without due process of law. Petitioners' land was taken pursuant to a state eminent domain proceeding which afforded petitioners notice and an opportunity to be heard on all constitutional questions. This proceeding fulfilled all due process requirements.

b. Petitioners have failed to allege any violation of the Civil Rights Act, 42 U.S.C. § 1983.

i. Petitioners have failed to allege a deprivation of property without due process of law.

ii. The Luckman Defendants were not acting under color of state law.

c. Petitioners' first cause of action is barred by the principles of collateral estoppel. In this connection, petitioners are bound by the determination of the public use issue in the condemnation action and the extrinsic fraud issue in the state court fraud action. All of the requirements for application of the doctrine of collateral estoppel are present, to wit:

i. There is an identity of issues between the condemnation action and this action in that the public use issue, decided adversely to petitioners

in the condemnation action, is an essential element of the first cause of action. The "excess condemnation" referred to by petitioners in their brief is merely part of the public use issue.

ii. There is an identity of issues between the state court fraud action and this action, in that the issue of extrinsic fraud regarding the condemnation judgment, decided adversely to petitioners in the state court fraud action, is again raised by petitioners in this action.

iii. There was a final judgment on the merits in the condemnation action. The judgment in the state court fraud action is also final.

iv. Petitioners, against whom the plea of *res judicata* was asserted below, were parties to the prior adjudication in both the condemnation action and the state court fraud action. The federal courts have abolished the doctrine of mutuality and it is immaterial that the Luckman Defendants were not parties to the condemnation action. The Luckman Defendants were, of course, parties to the state court fraud action.

d. Petitioners' first cause of action is barred by the principles of *res judicata*.

i. Petitioners' first cause of action is the same as the cause of action involved in the condemnation action. The primary right (to own and hold property free from unlawful interference) and the delict or wrong (the unconstitutional taking of petitioners' property) were the same in each case.

ii. The judgment in the condemnation action is, therefore, conclusive as to all substantive and

procedural issues relating to the constitutionality of the taking which were raised or could have been raised in that action.

e. The Calfornia cases cited by petitioners are inapplicable.

I.

THIS COURT HAS ALREADY DENIED PETITIONERS RELIEF IN A PRIOR ACTION BETWEEN THE PARTIES BASED UPON THE SAME FACTS.

As demonstrated by the Statement of Facts, the present Petition is not the first time petitioners have brought this matter before this Court. In the state court fraud action, based upon identical facts, petitioners sought essentially the same relief which they now seek in this federal action. Petitioners filed a Petition for Writ of Certiorari to this Court to review the adverse decision of the California Court of Appeal. This Court denied the Petition.

Petitioners have followed their usual pattern of repeatedly filing a virtually identical brief in every Court which has addressed the litigation between the parties. This Court will note, for instance that pages 18 through 56 of the Petition herein are identical to pages 5 through 41 of the Petition for Writ of Certiorari (Case No. 76-1091) which they filed earlier with this Court in connection with the State Court Fraud Action. Petitioners have not advanced any significant reasons for granting certiorari which were not advanced in the previous Petition filed with this Court.

II.

PETITIONERS HAVE FAILED TO ADVANCE ANY REASON WHICH WOULD JUSTIFY GRANTING CERTIORARI.

Rule 19 of the Rules of the Supreme Court, while not exhaustive, sets forth the traditional reasons forming the basis for a grant of certiorari. None of the reasons set forth in Rule 19, nor any other reason of that character, are present in this case.

Petitioners have failed to demonstrate that there is any conflict among the courts of appeals with respect to any issue involved in this action. Petitioners have similarly failed to demonstrate that the Court of Appeals has decided an important question of state law in conflict with applicable state law.

In the same manner, this case does not involve a decision by the Court of Appeal of an important federal question as yet unsettled by this Court or in conflict with applicable decisions of this Court. In this regard, it is apparent that the lower court's decision was based upon traditional doctrines of *res judicata* and collateral estoppel. These doctrines are well settled and, at least as applied to the present case, are not the subject of any conflict between the courts of appeals.

Furthermore, petitioners have failed to demonstrate that this case has any significance or importance to anyone other than the litigants themselves. The alleged wrong is clearly limited to the facts of this case and does not represent some continuing evil in the governmental exercise of eminent domain powers in California or elsewhere. Petitioners claim to be the victims of a wrongful taking of their property by means of alleged fraud and perjury in a condemnation action. It is

apparent that, even if judgment in petitioners' favor were obtained, the ruling would have no substantial effect on anyone except the litigants to this action.

III.

THE DECISION OF THE COURT OF APPEAL BELOW WAS MANIFESTLY CORRECT. IT THUS PRESENTS NO QUESTION WHICH MERITS SUPREME COURT REVIEW.

A. Plaintiffs Failed to State a Claim for the Taking of Property Without Due Process of Law.

Petitioners admit that their property was taken pursuant to a final judgment in a condemnation action filed in the state court. Since petitioners were afforded notice and the opportunity to be heard, and obtained all of the other procedural safeguards inherent in the California eminent domain statutes and judicial system, it is apparent that all due process requirements were satisfied.

There is no more fundamental right of the State than the right of eminent domain—the right to take property for public use upon payment of just compensation. As the United States Supreme Court stated in *Georgia v. Chattanooga*, 264 U.S. 472 (1924):

> "The power of eminent domain is an attribute of sovereignty, and inheres in every independent State. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State." [Citations omitted] 264 U.S. at 480.

The pleadings and records from the state court action demonstrate that petitioners were afforded an opportunity to be heard with respect to the public use issue and the compensation issue in the condemnation action. Petitioners appeared in the action, were represented by counsel, filed pleadings raising the issues, called witnesses and presented evidence on the issues at a full trial. Under these circumstances, all requirements of due process were met in connection with the condemnation.

> *Green Street Ass'n. v. Daley*, 373 F.2d 1 (7th Cir.), *cert. den.*, 387 U.S. 932 (1967);
>
> *Beistline v. San Diego*, 256 F.2d 421 (9th Cir.), *cert. den.*, 358 U.S. 865 (1958);
>
> *Landowners Consideration Ass'n. v. Montana Power Co.*, 300 F.Supp. 54 (D.Mont. 1969), *appeal dism'd*, 439 F.2d 722 (9th Cir. 1971);
>
> *Robinette v. Chicago Land Clearance Comm'n.*, 115 F.Supp. 669 (N.D. Ill. 1951);
>
> *Zisk v. Roseville*, 56 Cal.App.3d 41 (1976).

Petitioners rely upon a line of cases, commencing with *Mooney v. Holohan*, 294 U.S. 103 (1935), for the proposition that the alleged infidelity of the City in the condemnation action deprived them of due process and that such deprivation can be remedied by a collateral attack. These cases are criminal cases, however, and their rationale has never been extended to condemnation cases which are civil in nature. Furthermore, even in criminal cases, government infidelity does not necessarily give rise to a civil cause of action. *Imbler v. Pachtman*, 424 U.S. 409 (1976). In that case, plaintiff brought an action against a state prosecutor under the Civil Rights Act, 42 U.S.C. § 1983, alleging that the prosecutor knowingly used perjured testimony to obtain a conviction of plaintiff. The complaint further alleged that the use of such perjured

testimony and the suppression of other evidence by the prosecutor resulted in a deprivation of plaintiff's due process rights. The Supreme Court affirmed a dismissal of the complaint, however and held that the use of such perjured testimony does not give rise to a civil cause of action for damages.

Petitioners' cases are unpersuasive in light of the specific authority of the *Montana Power* and *Beistline* decisions cited above, which held that there was no violation of due process rights even though fraud on the part of the condemning authority was alleged.

B. Petitioners Fail to Allege Any Violation of the Civil Rights Act.

In the jurisdictional allegations of their Complaint, petitioners purport to state a cause of action under the Civil Rights Act, 42 U.S.C. § 1983, which provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In order to state a claim for relief under this statute, the Complaint must allege (1) action taken under color of state law and (2) resulting deprivation of

rights, privileges or immunities secured by the Constitution or by federal law.

> *Sykes v. California (Dept. of Motor Vehicles)*, 497 F.2d 197, 200 (9th Cir. 1974).

The only conceivable right, privilege or immunity conferred by the Constitution or federal law of which petitioners might have been deprived is the right not to have property taken for public use without due process of law. As demonstrated above, petitioners' property was taken for public use upon just compensation, and all requirements of due process were met in connection with the state condemnation. Accordingly, petitioners have failed to allege any deprivation of federally protected rights actionable under the Civil Rights Act.

> *Green Street Ass'n. v. Daley*, 373 F.2d 1 (7th Cir.), *cert. den.*, 387 U.S. 932 (1967);
> *Landowners Consideration Ass'n. v. Montana Power Co.*, 300 F.Supp. 54 (D. Mont. 1969), *appeal dism'd*, 439 F.2d 722 (9th Cir. 1971);
> *Robinette v. Chicago Land Clearance Comm'n.*, 115 F.Supp. 669 (N.D. Ill. 1951);
> *Zisk v. Roseville*, 56 Cal.App.3d 41 (1976).

Furthermore, the Complaint herein fails to allege sufficiently that the Luckman Defendants were acting under color of state law in the activities described in petitioners' Complaint. Charles Luckman Associates is clearly a private corporation and Charles Luckman and Samuel M. Burnett are private citizens. At most, the Complaint alleges that these respondents conspired to conceal evidence and commit perjury concerning the intended use of the property in the condemnation action. It has been held, however, that allegations that a police detective and a prosecution witness conspired

to have the witness commit perjury in a criminal proceeding were insufficient allegations that the witness was acting under "color of state law" in a Section 1983 Civil Rights case.

> *Powell v. Jarvis*, 460 F.2d 551, 553 (2d Cir. 1972).

As the Court said in the *Powell* case, "the color of law requirement 'can rarely be satisfied in the case of anyone other than a state official.'" 460 F.2d at 553.

Since the Luckman Defendants were not state officials or purporting to act as such, the Complaint fails to state a claim for relief against these respondents under the Civil Rights Act, 42 U.S.C. § 1983.

C. This Action Is Barred by the Defenses of Collateral Estoppel and Res Judicata.

1. Collateral Estoppel Should Be Applied in This Action Against Plaintiffs on the Issue of Public Use.

Since this is a federal-question case, the applicability of the doctrines of collateral estoppel and *res judicata* are governed by federal law.[1]

> *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324 n. 12 (1971).

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[1]The defenses of *res judicata* and collateral estoppel may be raised in a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, prior to the filing of an answer, where the facts upon which the motion is based appear upon the face of the Complaint. *Connelly Foundation v. School Dist. of Haverford*, 461 F.2d 495, 496 (3d Cir. 1972); *Iacaponi v. New Amsterdam Casualty Co.*, 379 F.2d 311, 312 (3d Cir. 1967); *Florasynth Labs. v. Goldberg*, 191 F.2d 877, 880 (7th Cir. 1951). Furthermore, it is proper for the federal court, in connection with a motion to dismiss, to take judicial notice of the state court records in determining the *res judicata* or collateral estoppel effect of the state court judgment in the subsequent federal court action. *Iacaponi, supra*; *Holmes v. U.S.*, 231 F.Supp. 971, 972 (N.D. Ga. 1964).

Under the doctrine of collateral estoppel, where an issue has been raised, fully litigated on the merits and adjudicated by a final judgment in one action, that first judgment operates as an estoppel or conclusive adjudication as to such issue in any subsequent action. The rule of collateral estoppel was stated in the leading case of *Bernhard v. Bank of America*, 19 Cal.2d 807 (1942), which was followed by the Ninth Circuit in *Clark v. Watchie*, 513 F.2d 994 (9th Cir. 1975), and cited with approval by the United States Supreme Court in *Blonder-Tongue Laboratories, supra*. As stated in *Bernhard:*

> "The doctrine of *res judicata* precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. The doctrine also serves to protect persons from being twice vexed for the same cause." [Citations omitted]. 19 Cal.2d at 810-11.

There are three factors which the courts have considered in determining whether collateral estoppel should be applied in a particular case:

1. Whether the issue decided in the prior adjudication was identical with the one presented in the action in question;

2. Whether there was a final judgment on the merits in the prior adjudication; and

3. Whether the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 323-24 (1971);

Clark v. Watchie, 513 F.2d 994 (9th Cir. 1975);

Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1182 (3d Cir. 1972).

All of the criteria for the application of the doctrine of collateral estoppel are present in this case.

a. *Identity of Issues.*

The gravamen of petitioners' first claim is that their property was wrongfully condemned for public use when in fact the City did not intend to use the property for public use. Petitioners are now attempting to show that the property was intended to be sold to private developers for use as a hotel, trade center, office building and international banking center. Accordingly, an essential element of the first claim is that the true purpose of the condemnation was not for public use. However, the issue of public use has already been fully litigated and decided adversely to petitioners in the first condemnation action.

From the pleadings and records on file in the condemnation action, it is clear that the issue of public use

raised and determined in the condemnation proceedings is identical to the issue of public use in the instant case. Petitioners' contention now is exactly the same as it was in the prior proceeding—that the City intended to resell the land to private developers and that this did not constitute a public use.

In their Petition, petitioners discuss at length the concept of "excess condemnation" and assert that no justification existed for the excess condemnation which allegedly occurred in this case. The excess condemnation issue is, however, merely part of the public use issue.

Although "excess condemnation" is not a precise legal term, it generally refers to any taking of property not physically necessary for a public improvement. *See* Matheson, *Excess Condemnation in California; Proposals for Statutory and Constitutional Change*, 42 S. Cal. L. Rev. 421, 422 (1969). In the case at bar, petitioners allege that the City condemned more property than it needed for street widening and that it intended to use the excess property for private purposes. Petitioners do allege, therefore, an excess condemnation. However, the impropriety of such excess condemnation is part of the same public use issue litigated in the condemnation action, since petitioners have alleged that the excess property was not intended to be devoted to a public use. *See People ex rel. Dept. of Pub. Wks. v. Lagiss*, 223 Cal.App.2d 23, 41 (1963); Matheson, *supra* at 425-27.

b. *Final Judgment on the Merits.*

Petitioners acknowledge in paragraph 17 of their Complaint [C.T. p. 4] that the Judgment in the condemnation action became final on or about February 25, 1970. It is also clear that the issue was determined

on its merits, since the public use question was decided after a full trial, commencing on April 18, 1969, at which both oral and documentary evidence was received. Petitioners chose not to appeal the condemnation judgment.

c. *Petitioners Were Parties Defendant in the Condemnation Proceedings.*

The pleadings from the condemnation action establish that petitioners J. B. Rose, Florence Rose and Brownie-Rose Candies, Inc. were defendants in the condemnation action, appeared in the action and were fully represented at trial. Accordingly, petitioners are bound by the determination of the public use issue in the condemnation action.

The fact that the Luckman Defendants were not parties to the condemnation action does not, as petitioners suggest in their Petition, preclude their invocation of the doctrine of collateral estoppel in this case. Increasingly over the last thirty years, the use of collateral estoppel in both federal and state courts has ceased to depend on the artificial doctrine of mutuality. The modern trend has been to preclude a party from relitigating an issue decided against him in a prior action, even if the party asserting the estoppel was a stranger to the first suit. The federal rule comports with this trend.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971);

Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1182 (3d Cir. 1972);

United Air Lines, Inc. v. Wiener, 335 F.2d 379, 424 (9th Cir.), *cert. den.* 379 U.S. 951 (1964).

2. The Judgment of Condemnation Is Res Judicata and Precludes Relitigation of the Constitutionality of the Taking.

In addition to constituting collateral estoppel on the issue of public use, the judgment in condemnation was also *res judicata* on the entire question of the constitutionality of the taking.

The present action and the condemnation action are based upon the same claims. The primary right involved in each action was the same—to own or hold property free from unlawful interference. Similarly, the delict or wrong alleged in each case was the same—the unconstitutional taking of petitioners' property. Since the claims are the same, the judgment of condemnation was conclusive as to all substantive and procedural matters which were raised, or which might have been raised in the first action regarding the constitutionality of the taking. Petitioners' present collateral attack on the judgment of condemnation is therefore barred by the principles of *res judicata*.

Brown v. Georgia Power Co., 371 F.Supp. 543 (S.D. Ga. 1973), *aff'd* 491 F.2d 117 (5th Cir.), *cert. den.* 419 U.S. 838 (1974);

Hilliard v. Pennsylvania, 308 F.Supp. 756 (W.D. Pa. 1970), *aff'd on other grounds*, 438 F.2d 92 (3d Cir. 1971).

On the basis of these authorities, petitioners are foreclosed from further litigating any constitutional issues with respect to the taking of their property. Such issues could have been, should have been, and in fact were, raised in the state court condemnation action. If petitioners were dissatisfied with the decision of or procedures utilized by the state trial court, they could have raised any constitutional questions in the

state appellate courts with a right of ultimate review by the United States Supreme Court. The doctrine of *res judicata* precludes petitioners from litigating in the federal court those issues which could have properly been raised in the state court proceeding.

3. Petitioners Are Bound by the Determination in the State Court Fraud Action That There Was No Extrinsic Fraud to Justify a Collateral Attack on the Judgment of Condemnation.

Petitioners attempt to avoid the *res judicata* effect of the judgment in the condemnation action by the allegation of fraud and perjury perpetrated in connection with the judgment. The allegations of fraud in the Complaint in this action, however, are identical to the allegations of fraud in the state court fraud action previously brought by petitioners. The present action, therefore, is a second attempt by petitioners to collaterally attack the judgment in the condemnation action on the grounds of extrinsic fraud.

The rule with respect to extrinsic fraud was summarized in *Chisholm v. House*, 160 F.2d 632, 643 (10th Cir. 1947), wherein the Court stated:

> "Equitable relief from a judgment may be obtained on the ground of extrinsic or collateral fraud. Fraud is regarded as extrinsic or collateral where it prevents a party from having a trial or from presenting his cause of action or his defense, or induces him to withdraw a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured. Where, however, the judgment was founded on a fraudulent instrument or perjured evidence, or the fraudulent acts pertained

> to an issue involved in the original action and litigated therein, the fraud is regarded as intrinsic."

In the state court fraud action, respondents successfully demurred to the Third Amended Complaint on the grounds that the fraud, if any, alleged in the Complaint was intrinsic only. The sustaining of the demurrer without leave to amend on the grounds of *res judicata* necessarily implies a finding that there was no extrinsic fraud in connection with obtaining the judgment of condemnation. The Ninth Circuit has ruled that a party who unsuccessfully seeks to attack the integrity of a judgment in one proceeding is bound by the adverse judgment in a second proceeding attacking the integrity of the same judgment, even though some additional facts are pleaded in the second proceeding.

> *Lester v. National Broadcasting Co.*, 217 F.2d 399 (9th Cir. 1954).

Petitioners' present collateral attack on the judgment of condemnation in this action is barred by the adverse judgment in the state court fraud action, in which petitioners were also collaterally attacking the judgment of condemnation on identical grounds. An analysis of the three-part test pronounced in the *Bernhard* case, *supra* at page 23, demonstrates that all prerequisites for application of the doctrine of collateral estoppel on the extrinsic fraud are present in the instant case.

a. *Identity of Issues.*

An examination of the Third Amended Complaint in the state court fraud action and the Complaint in the present case demonstrates that the allegations of fraud, concealment of evidence and perjury are identical in both cases. Respondents contended in the

state court fraud action, as they do in the present case, that such allegations, even if true, did not constitute extrinsic fraud which would justify a collateral attack on the judgment in condemnation. Accordingly, the issues of whether the allegations of fraud constituted *extrinsic* fraud sufficient to support a collateral attack on the judgment of condemnation are identical in both suits.

b. *Final Judgment on the Merits.*

The demurrer to the Third Amended Complaint was sustained without leave to amend and the action was dismissed. The dismissal was clearly on the merits because the Court found the defense of collateral estoppel to exist as a matter of law, even if the truth of petitioners' allegations was accepted. Petitioners had exhausted the avenues of appeal and the judgment is final.

c. *Petitioners Were Parties to the State Court Fraud Action.*

Petitioners J. B. Rose, Florence Rose and Brownie-Rose Candies, Inc. were also parties in the state court fraud action. Although, as discussed above, there is no requirement of mutuality, defendants Charles Luckman Associates, Charles Luckman and Samuel M. Burnett were also defendants in the state court fraud action.

From the foregoing, it is clear that the doctrine of collateral estoppel prevents petitioners from again collaterally attacking the judgment of condemnation on the grounds of extrinsic fraud.

d. *The California Cases Cited by Petitioners Are Inapplicable.*

Petitioners, at pages 38-45 of their Petition, contend that the doctrine of collateral estoppel will not be applied where its invocation will result in an injustice. Petitioners cite only California cases, which are inapplicable to this federal case. Even the California cases cited by petitioners do not stand for the propositions for which they are cited. In this connection, petitioners cite *Cochran v. Union Lumber Co.*, 26 Cal.App.3d 423 (1972) and *Timmsen v. Forest E. Olson, Inc.*, 6 Cal.App.3d 860 (1970) for the proposition that the doctrine of collateral estoppel will not be applied where an injustice will result. The *Timmsen* and *Cochran* cases both relied upon Section 70 of the *California Restatement Judgments*. An examination of Section 70 demonstrates that the exception to the doctrine of collateral estoppel is limited to questions of law. In the condemnation action, the public use issue was a question of fact determined adversely to petitioners.

In every case seeking to set aside a judgment on the grounds of fraud or perjury, there is a danger that some injustice may result from applying the doctrine of collateral estoppel. This danger is, however, outweighed by the important public policies in favor of finality to litigation. As the Court aptly stated in *Kachig v. Boothe*, 22 Cal.App.3d 626, 642 (1971):

> "Paraphrasing the words of Chief Justice Beatty in *Pico v. Cohn, supra*, 91 Cal. at page 134, we recognize that the wrong in this case is a most grievous one. and we should be glad to redress it if a rule could be devised that would

> remedy the evil without producing mischiefs far worse. Reluctance on the part of witnesses to testify for fear of subsequent harassment by unfounded claims of perjury or endless litigation in which nothing was ever finally determined would be worse than occasional miscarriages of justice."

Petitioners also cite *Pentz v. Kuppinger,* 31 Cal. App.3d 590 (1973) and *Caldwell v. Taylor,* 218 Cal. 471 (1933). The *Pentz* case, however, bears no resemblance to this action. In the first place, petitioners incorrectly assert that *Pentz* is a non-fiduciary case. On the contrary, California courts have held that suits between spouses are fiduciary in nature and have made exceptions to the usual rules regarding extrinsic fraud in such cases. *See, e.g., Jorgensen v. Jorgensen,* 32 Cal.2d 13, 19-21 (1948).

It is important to note that the judgment collaterally attacked in *Pentz* was a Mexican judgment. It is understandable that our courts are much less hesitant to grant relief to a party from the judgment of a foreign country where the procedural safeguards do not compare with those of the United States courts and the standards of justice may be questionable. Accordingly, the *Pentz* decision is distinguishable and is unpersuasive in light of the many California condemnation cases directly in point. *See, e.g., Capron v. California,* 247 Cal.App.2d 212, 225-27 (1966); *Hamacher v. People,* 214 Cal.App.2d 180, 182-83 (1963); *Thiriot v. Santa Clara School Dist.,* 128 Cal. App.2d 548, 550-51 (1954). Each of these cases held

that plaintiff property owners were prevented by the doctrine of collateral estoppel from collaterally attacking a judgment of condemnation on the grounds that the governmental agency involved fraudulently deceived the landowners regarding the intended public use of the property. Since the landowners were not prevented from litigating these issues in the condemnation proceedings, the courts found no extrinsic fraud which would justify a collateral attack on the judgment of condemnation.

Caldwell v. Taylor is similarly inapposite. In fact, the holding in *Caldwell* tends to support the respondents' position. In *Caldwell,* the Supreme Court held that in order to allege fraud sufficient to warrant equitable relief from a prior judgment, the fraud alleged must not only be extrinsic, but it must not be the same fraud which was in issue in the prior suit. The Court stated:

> "It also seems to be the rule that the fraud alleged must not be the fraud which is in effect the issue in controversy, the fraud upon which the cause of action in the former suit was based." 218 Cal. at 477.

In the present case, it is clear that the fraud alleged by petitioners in their Complaint is essentially the same fraud which they raised in their defenses in the prior condemnation action. In other words, petitioners contended in the condemnation action, as they do now, that the City did not really intend to use the property for a public use.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: November 27, 1979.

Respectfully submitted,

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